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# Supreme Court of the United States

**October Term, 1944.**

**No. 496.**

J. F. FITZGERALD CONSTRUCTION COMPANY,
*Petitioner,*

*against*

CHRIS PEDERSEN, individually and as Agent and Representative for and in behalf of himself and all other employees of the Defendant similarly situated,
*Respondent.*

## Brief in Opposition to Petition for Writ of Certiorari.

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THE REPORTER COMPANY, Inc., Walton, N. Y.
1944

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IN THE

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J. F. FITZGERALD CONSTRUCTION COMPANY,
Petitioner,

against

CHRIS PEDERSEN, Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,
Respondent.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### I.

### Opinions delivered in the courts below.

The citations contained in petitioner's brief are correct as to the opinions delivered in the courts below.

### II.

### Jurisdiction.

The petition seeks the issuance of a writ of certiorari pursuant to the provisions of Section 237 (b) of the

Judicial Code (28 U. S. C. 344 [b]), for the purpose of a review of a final judgment rendered by the Supreme Court of the State of New York on remittitur of the Court of Appeals of that state. The final judgment was rendered in a proceeding in which the petitioner's claims under a statute of the United States of America, namely, the Fair Labor Standards Act of 1938, were granted.

The decision of the Court merely carried out the mandate of the United States Supreme Court in its final decisions made February 8, 1943, and March 8, 1943 (318 U. S. 740; 318 U. S. 742). The issue raised is merely a question of procedure in the state courts over which this Court has never exercised any jurisdiction.

No issue of constitutionality is presented.

## III.

## Statement of the Case.

Because the statement of the case as set forth by the petitioner in its brief (pp. 1-6, inc.) does not in the opinion of the respondent in some respects correctly, and in others not adequately, state the facts, the following statement is made.

The action was brought by one Chris Pedersen, individually and as agent for other employees similarly situated, to recover overtime wages, liquidated damages and counsel fees due them under the provisions of Sections 7 and 16 of the Federal Fair Labor Standards Act of 1938 (29 U. S. Code 201, *et seq.*). The case was tried in the Supreme Court of the State of New York upon an agreed statement of facts which has never since been altered, modified or changed in any respect. That agreement, so far as pertinent, was:

In September of 1938, abutments supporting two bridges were completely washed out and destroyed and the substructures of the other two bridges were destroyed by flood. Thereafter, the railroad company entered into a contract with the defendant, for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid. Defendant employed plaintiffs as its employees in doing work under the contract. These bridges were interstate bridges which had previously been dedicated to commerce.

The Trial Court dismissed the complaint and wrote an opinion (173 N. Y. Misc. 188; R. 12-15, inc.), holding substantially that it was the nature of the employer's duty that determined coverage under the act, the Court stating:

"Where the railroad engaged in interstate commerce itself repaired a bridge being used as an instrumentality of such commerce, an employee engaged in such operation is engaged in interstate commerce (*Pedersen v. Delaware, Lackawanna & Western R. R.*, 229 U. S. 146). * * * No such theory applies to the work of this defendant which was not engaged in interstate commerce at all."

The respondent then appealed to the Appellate Division, Third Department, of the State of New York, and the decision of lower Court was upheld by a divided vote of three to two, Mr. Justice Bliss writing a dissenting opinion, in which opinion Chief Justice Hill concurred. The majority opinion again holding that it was the nature of the employer's business which determined coverage under the act, the majority opinion stating:

"While the railroad company was obviously engaged in interstate commerce the defendant was an independent contractor employed by the rail-

> road to perform work clearly local in its character and separate and distinct from such commerce (*Browning v. Waycross*, 233 U. S. 16, 22). Plaintiffs were at no time employed by the railroad company" (262 App. Div. 665, R. 21).

The respondent herein then appealed to the Court of Appeals of the State of New York, which Court, without opinion, upheld the decision of the two lower courts (288 N. Y. 287).

Respondent herein then petitioned this Court for a writ of certiorari directed to the Supreme Court of the State of New York. The writ of certiorari was granted (318 U. S. 740). Upon this application the petitioner herein presented a brief to this Court in which it asked for a denial of said writ chiefly upon the grounds that the decision of the Court of Appeals constituted no broader holding than that the engagement in new construction of an instrumentality of commerce is not engagement in interstate commerce (see brief of Henry E. Foley and Charles E. Nichols in opposition to petition for writ of certiorari; October Term, 1942, Case No. 396).

That none of the lower courts had held that this work was new construction was pointed out to this Court in a reply brief of the respondent herein. This fact was plain in the record, for in the opinion of Mr. Justice Bliss the following appeared:

> "Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such" (R. 25).

The writ of certiorari was granted on the authority of *Overstreet v. North Shore Corporation*, 284, decided February 1, 1943 (318 U. S. 125).

After the reversal by this Court of the judgment, the petitioner herein made application to this Court for a re-argument of the case. This Court promptly denied the application with the following proviso:

> "* * * and without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought" (318 U. S. 742, R. 30).

The brief of the petitioner in application for a re-argument which was denied, contained the same reasons and argument as is now presented to this Court, and asked for identical relief. Since that time the petitioner has never attempted in any manner whatsoever to modify its stipulation nor to compel the respondent to amplify by proof the details of the employees' duties, but has in all courts contended that the modification by this Court was in fact a reversal of its prior decision, and has contended that the state courts, because of this modification, were duty-bound to dismiss the same complaint on the same record, which this Court in its decision held should not have been dismissed in the original court.

In its application for a re-argument before this Court, the petitioner herein intimated to this Court that some of the forty plaintiffs had been engaged in work for the defendant not so closely connected with interstate commerce as to be in legal contemplation a part of it, and we believe that this intimation prompted this Court in making the modification of its original judgment. After the Supreme Court decision was modified, the respondent herein refrained from the issuance of execution or of taking any other legal proceedings in the matter, awaiting one of the many procedures which were open to the defendant whereby it might attempt to avail itself of the benefits of this modification. The defendant, however, took no such procedure, nor has it as yet taken any such

procedure, but on the contrary moved once more in the Supreme Court of the State of New York for a dismissal of the complaint, contending on this motion (for dismissal of the complaint) (R. 34) that under the law of the State of New York no new trial should or could be had, and that the New York State Courts could and should grant, on the same record, the relief which the United States Supreme Court had refused. This motion for a dismissal of the complaint having been made, the plaintiff then became entitled to and did move on the record for summary judgment under Rule 113 of the Rules of Civil Practice of the State of New York (R. 35). Both motions were heard in the Supreme Court of the State of New York at the same time. When this motion for summary judgment was made the defendant became again entitled to avail itself of the benefits given it by the modification of the United States Supreme Court, for it could have then introduced answering affidavits setting forth that there was a dispute, which should be tried, as to the nature of the employment of any of the members of the class on whose behalf this action has been brought. The petitioner herein, however, submitted no answering affidavits whatsoever, and based its entire argument upon the contention that the complaint should be dismissed and that it consequently followed that if the complaint were dismissed that the motion for summary judgment could not be granted. Under this state of the pleadings the Supreme Court of the State of New York made the same decision which the United States Supreme Court had twice before made. It denied the defendant's motion for a dismissal of the complaint, and granted the plaintiff's motion for summary judgment. The opinion, handed down May 21, 1943 (R. 43) is unreported.

From this decision the petitioner herein appealed to the Appellate Division of the State of New York, Third Judicial Department. The Appellate Division sustained the lower court (266 App. Div. N. Y. 1032, R. 51).

The petitioner herein again appealed to the Court of Appeals of the State of New York which sustained the decisions of the lower Courts (293 N. Y. 126, R. 63).

## ARGUMENT.

### POINT I.

**The question sought to be raised herein having twice before been passed upon by this Court in the same case and no federal question existing, no reason exists for the issuance of the writ.**

The decision in the case at bar, *Pedersen v. Fitzgerald Construction Company* (318 U. S. 740), based upon the authority of the case of *Overstreet v. North Shore Corporation* (318 U. S. 125) and the decision of this Court in *McLeod v. Threlkeld* (319 U. S. 491), wherein the Court again cited with approval the case at bar (318 U. S. 740) by stating "so are employees of contractors when the employees are engaged in repairing bridges of interstate commerce," clearly and definitely establishes that men engaged in the repair of bridges are engaged in interstate commerce and are entitled to the protection of the Federal Fair Labor Standards Act. There can, therefore, be no uncertainty as to the obligation of employers as to their employees engaged in the repair of interstate bridges as respondent indicates.

When the agreed stipulation of facts were drawn there were 40 plaintiffs. The defendant might have elected to compel each one of them to prove the nature of his work. It elected, however, to stipulate as to this. It is obvious that in the repairing of a bridge where a portion of the work is the construction of new abutments and the other portion is repair of substructures, that there are many

different types of work to be done on that bridge. It, therefore, became necessary in describing the nature of the work performed by 40 plaintiffs to make a broad stipulation which would cover the nature of the duties of all 40 plaintiffs, and still have that stipulation show that their work was in connection with the repair of interstate railroad bridges. When the agreed stipulation of facts are read, it will be seen that they provided as follows:

1. That the bridges were on railroads whose lines ran between the State of New York and the Commonwealth of Massachusetts (R. 9).

2. That the New York Central Railroad entered into a contract with the defendant (R. 9).

3. That the contract entered into between the railroad and the defendant provided for nothing except (R. 9)

   a. The construction of new abutments under the two bridges where the abutments had been washed out, and

   b. The repair of the substructures of the other two bridges which had been damaged.

4. The defendants employed the plaintiffs in doing the work under said contract (R. 10).

To quote Mr. Justice Foster, no other conclusion could be drawn from a reading of the agreed stipulation of facts than that (R. 46)

> "The fair import of these conceded facts is that defendant was engaged in certain work, and that plaintiff and his associates were its employees, *not generally*, but in doing *this particular work*. During the course of this litigation defendant's chief emphasis was placed upon the alleged local character of the work by an independent contractor not itself engaged in interstate commerce, with subordinate emphasis placed upon the fact that work

on the abutments was new construction. To the contrary, plaintiffs' emphasis was placed upon the claim that the entire work was a repair job to an interstate transportation system irrespective of the fact that the work was undertaken by an independent contractor. I do not find that lack of information concerning the hourly or daily activities of each employee was made a point of attack until the decision of the United States Supreme Court came down, and I think that both parties assumed the construction of the conceded facts which I have indicated. But in any event the conceded facts, *in my judgment, embrace no activities not essential to the main work of repair* (*Pedersen v. Delaware, Lackawanna & Western Railroad Co.*, 229 U. S. 146). Such, I think, was the fair import of the facts as contemplated by the parties when the agreed statement was made." (Italics ours.)

The duties of the plaintiffs, if explained minutely and in detail, would all be summed up to the work of repair of interstate bridges. The petitioner herein knew this when the stipulation was drawn. It knows it now. That is why it has continuously since the decision of this Court, insisted before all of the state courts that no new trial should be had. That is why throughout the years it has been continuously by changing and contradictory arguments and by resorting to technicalities sought to avoid compliance with this important federal statute.

The only issue determined by the state courts, and the only issue presented to this Court, is one of civil procedure. The petitioner herein could easily have required of the plaintiff proof of the details of each workers' duties, by merely interposing on the motion for summary judgment a short answering affidavit. The failure to file any answering affidavit whatsoever resulted, as Judge Loughran stated, in (R. 64): "No other or different showing was attempted by the defendant on the present motions, despite the proviso we have quoted from the mandate of

the higher court. On the record as it stood, a summary judgment for the plaintiffs was inevitable."

The purpose of a motion for summary judgment is to avoid trials where no issue exists. In cases where there is an issue, the defendant must so assert by affidavit. When an issue appears, summary judgment cannot be granted. But here the petitioner failed to submit to the Court any issue to be tried by its failure to interpose any answering affidavit.

On page 8 of the petitioner's brief it is argued if such decision (referring to the decision of the Court of Appeals, 293 N. Y. 126, R. 63) is not corrected, it will create uncertainty with respect to the coverage of the Fair Labor Standards Act in that large field of employment consisting of employment in work related to the repair, etc. * * * on railroad bridges, rights of way, public highways, streets and bridges, air fields, telephone transmission lines, gas mains, water mains and electric transmission lines, to mention only some of the employment fields affected. The decision of the United States Supreme Court (318 U. S. 740) and the decision of the Court of Appeals (R. 63, 293 N. Y. 126) apply only to the repair of bridges carrying the tracks of an interstate railroad previously dedicated to commerce. In all of the courts of the State of New York petitioner has cited many federal cases which held that work in connection with railroads, transmission lines, etc., which are engaged in both interstate and intrastate commerce have at times been held to be work not so closely connected with commerce as to be in legal contemplation a part of it, but petitioner has never cited before these courts, nor does it cite in this court, any authority which holds that men engaged in the repair of interstate railroad bridges previously dedicated to commerce are not engaged in commerce. In fact, the work of Pedersen in *Pedersen v. Delaware, Lackawanna &*

*Western Railroad Co.* (229 U. S. 146), who was carrying bolts to be delivered to another man, who in turn would use them in the repair of a bridge, was engaged in about the most remote duty that it is possible to imagine in connection with the repair of bridges.

The agreed stipulation of facts can be read no other way than that the plaintiffs were engaged in the repair of an interstate railroad bridge previously dedicated to commerce, and regardless of the minuteness of the details of their work they are obviously, under the decision of this Court, engaged in interstate commerce and entitled to the benefits of the Fair Labor Standards Act.

On page 12 of the petitioner's brief a quotation is made from Mr. Justice Schenck's decision in the Appellate Division, in which Mr. Justice Schenck refers to four different plaintiffs, A, B, C and D. Justice Schenck concedes that the cases of A and C would be covered by the Act. The case of B (*Erie R. R. Co. v. Szary*, 253 U. S. 86, as overruled in *Chicago & Eastern Ill. R. R. Co. v. Ind. Comm.*, 288 U. S. 296) is clearly distinguishable, for there this Court held that persons engaged in furnishing sand or water to locomotives, there being no proof whatsoever as to whether the locomotives were to be used in either interstate or intrastate commerce, are not necessarily engaged in commerce. This, of course, is obvious. But no court has held that the carrying of sand or water for the repair of an existing interstate railroad bridge previously dedicated to commerce would not be engaged in interstate commerce, nor do we think that any such court will ever so hold. And in the case of D, the only remaining one, this Court pointed to the distinction by citing in its opinion the case at bar, stating:

> "So are employees of contractors when the employees are engaged in repairing bridges of interstate railroads (*Pedersen v. J. F. Fitzgerald Construction Co.*, 318 U. S. 740)."

There being no issue therefore which this Court has not previously decided, and the state courts having held that under the procedure followed and the statutes of the State of New York covering the rules of civil procedure, no other possible judgment could be rendered, there exists no reason for the issuance of the writ.

## POINT II.

**The award of interest on the judgment was proper.**

The only other question raised is the question of whether or not interest on the award of damages should have been allowed. Since this Court has already issued a petition for a writ of certiorari in *Greenberg v. Arsenal Building Corporation, et al.* (.....F. [2d].....) decided July 18, 1944, and since this question will be decided by the decision of this Court in that case, there is no possible public reason for repeating its decision in this case. The respondent herein will abide by the decision of this Court in the *Greenberg* case (*supra*), so far as the question of the interest upon the awarding of interest is concerned.

The respondents, however, contend that they are entitled to interest. The liability for liquidated damages under the Federal Fair Labor Standards Act is contractual in character. (*Overnight Motor Co. v. Missell*, 316 N. Y. 572, 583; *Northwestern Yeast Co. v. Brouthe*, 133 F. 2d 628; see too, *Cox v. Lykes Brothers*, 237 N. Y. 376; *Wright v. State of New York*, 223 N. Y. 44; *Calvin v. Huntley*, 178 Mass. 29.)

Section 480 of the Civil Practice Act reads as follows:

"* * * In every action now pending or hereafter brought wherein any sum of money shall be awarded

by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, other than a contract to marry, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated, and shall be added to and be a part of the total sum awarded."

"This section is a mandatory direction to the court to include in every verdict on a contract action the interest thereon, whether the demand was liquidated or unliquidated." *McLaughlin v. Brinkerhoff* (222 App. Div. N. Y. 458).

In actions for breach of contract the interest runs from the date of the breach (*Greater New York v. Philadelphia and Reading*, 252 App. Div. N. Y. 883).

While in other cases it is held that interest should be computed from the date of the commencement of the action (*Morgan Lake Co. v. New York, N. H. & H. R. R. Co.*, 262 N. Y. 234).

See also *Sweeney v. City of New York* (173 N. Y. 414), wherein the Court reviews the question of adding interest to the amount of judgment on a date from which the interest should run. The Court said, quoting from Judge Earl in *White v. Miller* (78 N. Y. 393):

"Where an account for services, or for goods sold and delivered, which has become due and is payable in money, although not strictly liquidated, is presented to the debtor and payment demanded, the debtor is put in default and interest is set running; and that, if not demanded before, the commencement of suit is a sufficient demand to set the interest running from that date."

In the case at bar the amount the plaintiffs had due them was known, ascertainable, agreed and stipulated upon between the parties to be a certain amount of money at the date the action was commenced. They are, therefore, entitled to interest under the same for howsoever long the defendant is in default in making payment.

In *Quinn v. Sigretto* (229 App. Div. N. Y. 727) the Court held that the plaintiff was entitled under this section to have interest added to the verdict and included in the judgment even though not demanded in the complaint or proved on the trial.

In *Freedman v. Hart & E. Co.* (162 Misc. N. Y. 487) the Court held that the date of institution of action is the fairest point to start the running of interest.

Even before the enactment of Section 480 of the Civil Practice Act of the State of New York, the question of whether or not a judgment carried with it interest was determined by whether or not at the time the action was commenced the defendant knew or was able to ascertain the exact amount of money owed the plaintiff. In the present case the amount due to the plaintiff was known and ascertainable at the time that the summons and complaint were served. In fact, in the agreed stipulation of facts the amount of money due each plaintiff was agreed upon by the parties and fixed at a definite sum down to the last penny. That amount of money was due each of the plaintiffs in 1939 and it has been due to the delay of the defendant that the same has not been paid.

The Courts have repeatedly held that the additional equal amount of damages that the defendant who fails to pay his workers under the Fair Labor Standards Act is required to pay is not a penalty, but is in the form of liquidated damages, and is additional compensation to the employees for the illegal deprivation of such compensation, and is due them immediately upon the violation of the statute. See *Maddox v. Jones* (42 F. Supp. 35). *La Guardian v. Austin-Bliss General Tire Co.* (41 F. Supp. 678), *Hargrave v. Mid-Continent Petroleum Corporation* (36 F. Supp. 233), *Robertson v. Argus Hosiery Mills* (32 F. Supp. 19).

Since the amounts due these men are in the form of liquidated damages, the amounts of which are easily ascertainable, and since it was due at the time of the commencement of the action, there can be no doubt that interest thereon should be paid to them, just as interest was paid to the employees in a similar case under the same statute in *Sneider v. Sports Vogue* (35 N. Y. S. 2nd 341).

Chief Justice Hughes of the United States Supreme Court, speaking on the subject of interest in the case of *Funkhouser v. J. B. Preston Co.* (290 U. S. 167), said:

> "The statutory allowance is for the purpose of securing a more adequate compensation by adding an amount commonly viewed as a reasonable measure of the loss sustained through delay in payment. It has been recognized that a distinction, in this respect, simply as between cases of liquidated and unliquidated damages, is not a sound one. Whether the case is of the one class or the other, the injured party has suffered a loss which may be regarded as not fully compensated if he is confined to the amount found to be recoverable as of the time of breach and nothing is added for the delay in obtaining the award of damages. Because of this fact, the rule with respect to unliquidated claims has been in evolution (*Faber v. New York*, 222 N. Y. 255), and in the absence of legislation the courts have dealt with the question of allowing interest according to their conception of the demands of justice and practicality."

In another part of the same decision Justice Hughes said:

> "Today, however, it may be said that if a claim for damages represents a pecuniary loss, which may be ascertained with reasonable certainty as of a fixed day, then interest is allowed from that day. The test is not whether the demand is liquidated. Was the plaintiff entitled to a certain sum? Should

the defendant have paid it? Could the latter have determined what was due, either by computations alone or by computation in connection with established market values or other generally recognized standards."

"A debtor has no substantial right to avoid the payment of interest in full." *Preston Co. v. Funkhouser* (261 N. Y. 140.)

The fact that this action was brought under a federal statute in no way changes the circumstances. In *Schumacker v. Leterman, et al.* (14 Fed. Supp. 1015) it is clearly pointed out that in the Federal Courts the question of whether or not interest is added to the judgment depends upon the law of the state in which the district court is located. In that case the Court stated:

"Interest runs on judgments of the district court where by law of the state where such court is held, interest runs on judgments of the state courts. Revised Statutes, Section 966 (28 U. S. C. A., Sec. 811). Since the New York Law is that judgments carry interest (Civil Practice Act, Section 481), this judgment should carry interest."

In *Klausner v. Queens Fur Dressing Co., Inc.* (130 Misc. N. Y. 579), the Court said:

"The rule may then be somewhat stricter. The distinction has a possible justification in common modes of thought and practice. A bill for services is felt to cast the burden on the debtor either to pay what is demanded, or, if dissatisfied, to state how much is due. A claim for damages is felt to be more appropriately a subject for assessment by the courts or by some form of arbitration. Even in such circumstances, one marks a growing tendency to make interest an incident where it might once have been excluded (*Bernhard v. Rochester German Ins. Co.*, 79 Conn. 388; *Darlington v. Gates Land Co.*, 151 Wis. 461; *General Supply & Const. Co. v. Goelet*, 241 N. Y. 28, 39)."

## CONCLUSION.

**It is respectfully submitted that this Court should deny the petition for writ of certiorari.**

Dated, October 4, 1944.

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